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No. 803

IN THE

Supreme Court of the United States

October Term, 1962

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an agricultural improvement district,

Appellant,

v.

THE CITY OF MESA, a municipal corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Table of Contents

	PAGE
1. Arizona's Constitution and Statutes, Making the District a Political Subdivision of the State, Do Not Give the State Absolute Control Over the District as a Federal Instrumentality so as to Deprive It of the Right to Protection under the Federal Constitution	2
2. Since the District, in its Electrical Power Operations, Is a Federal Instrumentality, It May Invoke the Equal Protection Clause Against the Arbitrary and Erroneous Distinction Drawn by the Supreme Court of Arizona between the City and the District	6
3. The Question Presented Is Not Raised for the First Time in This Court	7
Conclusion	10

Authorities Cited

CASES:

Gomillion v. *Lightfoot*, 364 U. S. 339 (1960)	5, 6
Hunter v. *Pittsburgh*, 207 U. S. 161 (1907)	2, 3
United States v. *Bekins*, 304 U. S. 27 (1938)	4
Williams v. *Baltimore*, 289 U. S. 36 (1933)	6

CONSTITUTION AND STATUTES:

U. S. Const. Amend. XIV, § 1	6, 7
Arizona Revised Statutes Annotated (1956):	
§ 45-902	2
§ 45-903	2, 3
§ 45-936	4, 5
§ 45-937	3

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The three contentions advanced by the City of Mesa * in its Motion to Dismiss or Affirm in support of the argument that no substantial federal question is raised by this appeal will be considered in sequence.

* As in the Jurisdictional Statement, the City of Mesa will be referred to as "the City" and the Salt River Project Agricultural Improvement and Power District will be referred to as "the District." References to pages of appellee's Motion to Dismiss or Affirm will be designated by "(Motion —)."

1. Arizona's Constitution and Statutes, Making the District a Political Subdivision of the State, Do Not Give the State Absolute Control Over the District as a Federal Instrumentality so as to Deprive It of the Right to Protection under the Federal Constitution.

The City argues that a state has "absolute control" over its political subdivisions and therefore "may do as it will" regarding their powers and property, "unrestrained by any provision of the Constitution of the United States" (Motion 6). However, the cases cited by the City for this thesis themselves show that it has important exceptions which render it inapplicable to the case at bar.

Thus, the leading case of *Hunter* v. *Pittsburgh*, 207 U. S. 161 (1907), explains that the basis of the state's dominion over municipal corporations is that they "are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." 207 U. S. at 178. Hence, it is as *state* agencies exercising *state governmental* powers that purely *local* municipalities are subject to the "absolute control" of the state unrestrained by federal constitutional limitations.

However, the District was not created nor does it function merely as a state agency. Rather, the state authorized the organization of the District by owners of lands within a United States reclamation project in order to secure water and electrical power for such lands, to sell surplus water and power to reduce the cost of irrigating these lands and to construct, maintain and finance the necessary project works to achieve these ends. ARS § 45-903. It was to enable the District to accomplish these federal purposes—identical with those of Congress in enacting the Reclamation Act—that the state clothed the District with certain powers and privileges "granted generally to municipal corporations by the Constitution and statutes of the State." ARS § 45-902.

Furthermore, *Hunter* v. *Pittsburgh* held that the state, "at its pleasure", may take "without compensation" such property as is acquired and used by a municipal corporation for "the purpose of executing . . . properly and efficiently" "such of the governmental powers of the state as may be intrusted to them." 207 U. S. at 178. The Court was careful, however, to limit this "absolute power of the state over the property of municipal corporations" to "property held and used for [state] governmental purposes." 207 U. S. at 179. In this connection, the Court questioned, without deciding, "whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation." 207 U. S. at 179.*

In the instant case, the District did not acquire and does not hold or operate its electrical power facilities for the purpose of exercising, as a state agency, any governmental functions of the State of Arizona. On the contrary, the very statutes of Arizona authorizing the District's organization expressly provide that title to property acquired by the District is to be held "*in trust for, and is dedicated and set apart to*, the uses and purposes" of the statute creating the District. ARS § 45-937 A (italics added). Those purposes, we repeat, were the *federal* purposes of the Salt River Project—a federal reclamation project. ARS § 45-903. The State of Arizona, having thus consented that the property of the District be held in trust for and dedicated and set apart to federal uses and purposes, may not authorize the City (through judicial construction of the

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* The Supreme Court of Arizona did not regard the District as a purely municipal corporation under the absolute control of the State of Arizona. Instead, it held that the District "is essentially a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized." That is why the court held that the City, in taking the power facilities of the District, would be required to pay just compensation therefor (Jurisdictional Statement, p. 13a).

state constitution and statutes) to take this property, so trusteed and dedicated, from the District without the consent either of the District or the United States.

In *United States* v. *Bekins*, 304 U. S. 27 (1938), the question before the Court was whether the exercise of the federal bankruptcy power, in dealing with a composition of debts of an irrigation district upon its voluntary petition, with the state's consent, was an unconstitutional federal interference with the state's sovereign power over its political subdivisions. The Court stated:

> "It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. . . . The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution." 304 U. S. at 52.

The State of Arizona has consented, by appropriate legislation, to the operation of its agricultural improvement districts as instrumentalities of the United States in carrying out the purposes of federal reclamation projects within the state. The Arizona statutes relating to the formation and management of such districts are clearly designed to facilitate federal maintenance and operation of reclamation projects through the agency of the districts. See Jurisdictional Statement, pp. 13-15.

ARS § 45-936 expressly authorizes the board of directors of the District to enter into and perform contracts with the United States:

> "A. . . .
>
> "3. For providing or furnishing power or any means of communication for the use of the owners or occupants of land within the district.

> "4. To reduce the cost of irrigation, drainage and power to the owners of the lands in the district by the sale of surplus water or power produced, owned or controlled by the district, and the construction, maintenance, extension, replacement, financing and refinancing of the works useful for such purpose."

Since the District is utilizing its power facilities and works as an integral component of the power system of the Salt River Project with the consent of the State of Arizona, the compulsory transfer of the District's property to the City would not be an exercise of state power "wholly within the domain of state interest." *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960). Therefore, the power of the state to regulate and control the property of the District is subject to and limited by the federal public use to which that property has been trusteed and dedicated.

This entrustment and dedication of the District's property to the uses of a federal reclamation project prevent its taking by the City in condemnation, even if, as the Supreme Court of Arizona decided, the District's electrical transmission facilities are held by it in its private or proprietary capacity (Jurisdictional Statement, pp. 9a, 13a). For even then the property, although privately held (as it was originally by the Salt River Valley Water Users Association, a private corporation), is nevertheless trusteed and dedicated to a federal public use and purpose, which neither the state nor the City may interfere with or frustrate.

The Court's decision in *Gomillion* v. *Lightfoot*, *supra*, places in proper perspective the constitutional limitations upon the state's control over its political subdivisions. There, Justice Frankfurter, speaking for a unanimous court, after reviewing the line of cases dealing with the power of a state over its municipalities, stated:

> "This line of authority conclusively shows that the Court has never acknowledged that the States

> have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." 364 U. S. at 344-45.

Justice Frankfurter's ultimate conclusion in *Gomillion*, has, we believe, a special significance and application here:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S. at 347.

2. Since the District, in its Electrical Power Operations, Is a Federal Instrumentality, It May Invoke the Equal Protection Clause Against the Arbitrary and Erroneous Distinction Drawn by the Supreme Court of Arizona between the City and the District.

Assuming the correctness of the general proposition stated by the City that "the Equal Protection Clause was not designed to insulate state instrumentalities from state action" (Motion 8), that doctrine is not applicable here.

As Justice Cardozo indicated in *Williams* v. *Baltimore*, 289 U. S. 36, 40 (1933), the reason why the benefit of the Equal Protection Clause is usually not available to municipalities is that

> "a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Since, as we have previously stated, the District in its electrical transmission operations is not a state agency, but

rather an instrumentality of the United States engaged in the maintenance and operation of the power system of a federal reclamation project, it is hardly debatable that the District, as a federal agency, is entitled at the very least to equal treatment with a state instrumentality under state law. It is because the City, as a purely state agency, has been given preferential treatment over the District, a federal agency, that the protection of the Equal Protection Clause of the Fourteenth Amendment was properly invoked by the District and improperly denied to the District in the court below.

3. The Question Presented Is Not Raised for the First Time in This Court.

The City asserts that the questions presented in the Jurisdictional Statement are raised for the first time in this Court (Motion 10-12). However, elsewhere the City is contending that these questions were not only raised in, but decided by, the Arizona Supreme Court and are *res judicata*.

On December 21, 1962, the City commenced suit in the Superior Court, Maricopa County, Arizona, No. 145304, to condemn the District's electrical power transmission facilities involved in the case at bar. The District moved to dismiss the complaint upon the grounds, among others, that: (1) the interests of the United States in the maintenance and operation of the facilities as part of the Salt River Project power system are such as to make the United States an indispensable party to the condemnation action; and (2) the taking of the District's property in condemnation would deny it the equal protection of the laws guaranteed by the Fourteenth Amendment.

The City's Answering Memorandum in opposition to the motion asserts (p. 1) that the "grounds raised by the District in its motion to dismiss . . . have been decided ad-

versely to the District in the case of *City of Mesa, Appellant* v. *Salt River Project Agricultural Improvement and Power District, Appellee,* 92 Ariz. 91, 373 P. 2d 722, and therefore, such matters are res judicata."

The City's Memorandum continues (p. 4):

> "Thus the right of Mesa to condemn the precise areas and precise facilities described in the complaint on file herein was a matter in issue in this Court in that former case.
>
> "While the question of the United States being an indispensable party was not therein argued, the precise issue here in question was decided, that is, that Mesa may condemn these facilities, hence, is res judicata, and District may not now raise that issue. Further, the precise issue as to the *ownership of the facilities that Mesa seeks* to condemn, was litigated and decided in that action, and all contracts attached to District's affidavit were therein brought to the attention of the Court and discussed." (City's italics)

The contracts referred to are those printed as Appendices E, F and G to the Jurisdictional Statement. After analysis of these contract provisions, the City concludes (p. 9):

> "Thus, it is plain that not only has the question of ownership of the facilities been decided to the effect that they are owned by the District, but *also decided in the prior case was the issue as to the interest of the United States in these particular facilities.*" (City's italics)

The City's Memorandum also states, even more categorically, that the Equal Protection question was raised and determined by the Supreme Court of Arizona in the instant action. As to this, the City states (p. 10):

> "That a taking of the District's property in this action is a taking in contravention of the Fourteenth Amendment to the Constitution of the United States,

and Section 4, Article 2 of the Constitution of the State of Arizona was raised in the case of *City of Mesa* v. *Salt River Project*, supra. The first reference to this question is found in the District's counterclaim on page 84 of the Abstract of Record. This question was argued vehemently to the Court in District's petition for rehearing, and brief in support thereof in the above case, wherein as a ground for its rehearing the District stated as follows:

> " 'The Court's decision, contrary to the plain meaning of the provision, denies to the District equal protection of the law guaranteed by the 14th Amendment of the Federal Constitution.' Petition for Rehearing, page 2.

"This argument is discussed at length in the petition for rehearing and brief in support thereof beginning on page 14. This contention of the District was overruled specifically by the Supreme Court, when on September 20, 1962, it made the following order:

> " 'ORDER: Motion for Oral Argument on Rehearing Motion—DENIED.
>
> " 'FURTHER ORDERED: Motion for Rehearing—DENIED.' "

In short, the City's contention before this Court that the questions presented on this appeal are raised for the first time in this Court (Motion 10-12), is wholly inconsistent with and contradictory to the position even now being taken by the City before the Arizona Superior Court —that these very questions were presented to and adjudicated by the Supreme Court of Arizona in the case at bar.

Conclusion

The Motion to Dismiss or Affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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